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Supreme Court, U.S.
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No. 00-1027

IN THE

Supreme Court of the United States

BETTY G. TRACY,

Petitioner,

v.

BAPTIST HEALTH CARE SYSTEM, INC.,
d/b/a WESTERN BAPTIST HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court properly grant and the Sixth Circuit properly affirm summary judgment in favor of Western Baptist Hospital on Ms. Tracy's sexual harassment claim on the grounds that she failed to establish a *prima facie* case and Western Baptist Hospital responded promptly and adequately to her complaints?

2. Did the District Court properly grant summary judgment in favor of Western Baptist Hospital on Ms. Tracy's retaliation claim on the grounds that she did not suffer any adverse employment action and because she failed to demonstrate that any of Western Baptist Hospital's articulated legitimate non-discriminatory reasons for its actions were pretextual?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Baptist Healthcare System, Inc. d/b/a Western Baptist Hospital, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Betty Tracy's Petition for Writ of Certiorari should be denied because she fails to raise questions of importance. The decision below turns upon its own facts and will affect few others besides the parties involved. Furthermore, the Courts below properly applied the law to the undisputed facts in determining that Western Baptist Hospital was entitled to summary judgment on each of Petitioner's causes of action.

Petitioner failed to offer evidence sufficient to prove a *prima facie* case of sexual harassment, because she could not prove that the complained of conduct was severe and pervasive and that it altered the terms and conditions of her employment. Further, no *respondeat superior* liability existed because Western Baptist Hospital responded promptly and adequately to her complaints against a third party.

Petitioner's retaliation claim failed because she did not suffer any adverse employment actions. Further, even if Ms. Tracy had established an adverse employment action, she did not establish a nexus between her complaints of sexual harassment and the alleged adverse employment action. Finally, even if Ms. Tracy had successfully established a *prima facie* case of retaliation, she provided no evidence that Western Baptist Hospital's articulated legitimate non-discriminatory reasons for its actions were pretextual. In fact, Ms. Tracy does not challenge the Sixth Circuit's finding that she was unable to establish pretext.

STATEMENT OF FACTS

In her *pro se* petition, Ms. Tracy refers to numerous allegations that were not before the district court at the time it decided the summary judgment motion. Plaintiff thoroughly

discussed her allegations and her causes of action in her sworn deposition testimony and in her Response to Defendant's Motion for Summary Judgment. Nevertheless, she has portrayed as fact many allegations which appear for the first time in her Petition for Writ of Certiorari. These new allegations are unsupported by record evidence and were raised for the first time in her brief to the Sixth Circuit Court of Appeals or in her Petition for Writ of Certiorari. For example, on page 10 of her Petition for Writ of Certiorari, Petitioner alleges that

> an upper level member of [WBH] management was routinely making offensive sexual comments about patients who were utilizing the services of the Respondent, and that, specifically, Petitioner reported that it's [sic] management, in the presence of those employed within the area, and by using offensive slang language, questioned a physician concerning the smell of a patient's vagina.

She goes on to state that WBH terminated her for reporting this incident. This allegation was never raised before Ms. Tracy filed this Petition. Likewise, Ms. Tracy alleges that Mr. Rathbun, the alleged harasser, was promoted to a management position. This is simply incorrect. The record evidence clearly demonstrates that Mr. Rathbun was an outside contractor who was promptly removed from the hospital subsequent to Ms. Tracy's complaints. Furthermore, Plaintiff's termination was never a part of her lawsuit, although she relies on it to support her Petition for Writ of Certiorari.

Because of the lack of record support, because Ms. Tracy often flatly contradicts her sworn deposition testimony and because Ms. Tracy has attempted to present new allegations and evidence, Respondent denies all of Ms. Tracy's allegations as set forth in her Petitioner's Statement of Facts, except to extent that they are consistent with Respondent's Statement of Facts.

I. Statement of the Case.

Petitioner, Ms. Tracy, brought this suit in the U.S. District Court for the Western District of Kentucky against Baptist Healthcare System d/b/a Western Baptist Hospital ("WBH") on January 27, 1998, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.* She alleged that she had been subjected to a sexually hostile work environment at WBH by a third-party, an employee of a company under contract with WBH to provide services within the medical records department. (R.1, Complaint).[1] Ms. Tracy also claimed that after her allegations came to light, including her complaint to the EEOC, she was retaliated against by WBH. (R.1, Complaint).

II. Ms. Tracy's Employment With Western Baptist Hospital In 1995.

Ms. Tracy became an employee at Western Baptist Hospital ("WBH") in July of 1995. (R.19, Dep. of Tracy, p. 16). Before July, 1995, she worked for an agency known

1. Citations designated as "R." followed by a page number refer to the Record as certified to the Sixth Circuit Court of Appeals. Citations designated as "App." followed by a page number refer to the Appendix as designated in Petitioner's Petition for Writ of Certiorari.

as Temps Plus, (R.19, Dep. of Tracy p. 16). When hired by WBH, Ms. Tracy was assigned to the medical records department. (R.19, Dep. of Tracy pp. 16, 20). Med Copy, an independent company which contracted with WBH to provide services within the medical records department, had employees assigned therein. (R.19, Dep. of Tracy pp. 20, 22). The owner of Med Copy was Theresa Gurley. (R.19, Dep. of Tracy p. 21). In March of 1996, Don Rathbun was hired by Med Copy to work at Western Baptist Hospital. (R.19, Dep. of Tracy p. 25).

III. Ms. Tracy's Allegations Of Sexual Harassment.

On April 5, 1996, Ms. Tracy was working at the front desk of WBH with Mr. Rathbun. (R.19, Dep. of Tracy p. 26). As Mr. Rathbun walked by Ms. Tracy, his hand brushed her bottom. (R.19, Dep. of Tracy p. 28). Mr. Rathbun walked by Ms. Tracy again approximately three to five minutes later and grabbed her bottom. (R.19, Dep. of Tracy p. 29). Mr. Rathbun then left the area. (R.19, Dep. of Tracy p. 29). Later in the day Ms. Tracy was discussing, with a female co-worker, that she had a date that evening. Mr. Rathbun said to Ms. Tracy, "You need to cancel your date. You shouldn't go on your date." (R.19, Dep. of Tracy p. 37). Ms. Tracy then informed her female co-worker that she had considered going bowling on her date that evening. Mr. Rathbun said to Ms. Tracy, "Bowling is boring, you should give me 10 minutes. I could make you melt, and you would be mine, and 10 minutes would be all it would take." (R.19, Dep. of Tracy p. 38). Ms. Tracy ignored the comment and Mr. Rathbun walked away. (R.19, Dep. of Tracy p. 40).

Although WBH's sexual harassment policy provides that employees with complaints of sexual harassment should

report such harassment to their supervisor or the human resources department (R. 34, Def.'s Motion for Sum. Judgment, Ex. 2), Ms. Tracy did not report any of Mr. Rathbun's conduct to any of her supervisors that day. Later that evening, from home, Ms. Tracy called Ms. Gurley, the owner of Med Copy, and informed her of Mr. Rathbun's conduct. (R.19, Dep. of Tracy p. 42 and 43). Ms. Gurley apologized to Ms. Tracy. Another co-worker, who overheard the conversation, offered to talk to Mr. Rathbun on Ms. Tracy's and Ms. Gurley's behalf. (R.19, Dep. of Tracy p. 43). Ms. Gurley was not a WBH employee, and the co-worker was not a WBH supervisor. (R. 34, Def.'s Mot. For Sum. Judgment, Affidavit of Ms. Curtis). Ms. Gurley asked Ms. Tracy not to tell Linda Ramsey, Tracy's supervisor in the department, about the incidents of the day. Ms. Tracy agreed. (R.19, Dep. of Tracy p. 43). The co-worker talked to Mr. Rathbun the following Monday, April 8. (R.19, Dep. of Tracy p. 45). Ms. Tracy did not report the incidents to either of her supervisors that day, (R.19, Dep. of Tracy p. 48), or for some time thereafter.

On April 22, Mr. Rathbun had a confrontation with other employees while at work. (R.19, Dep. of Tracy p. 53). In the course of investigating this confrontation, Meri Curtis, the director of the WBH Medical Records Department, discovered Ms. Tracy's complaints concerning Mr. Rathbun. Ms. Curtis asked Ms. Tracy to submit a written account of her complaints. (R.19, Dep. of Tracy p. 54). Ms. Tracy provided documentation to Ms. Curtis on April 23, 1996. (R.19, Dep. of Tracy p. 55, R. 34, Def.'s Mot. for Sum. Judgment, Ex. 1). This was the first time Ms. Tracy's complaints regarding Mr. Rathbun were brought to the attention of any of her supervisors or anyone in WBH management.

IV. Western Baptist Hospital's Response to Ms. Tracy's Complaints.

In response to Tracy's complaints received on April 23, 1996, Meri Curtis spoke with WBH's Executive Director, Human Resources, Dick Thomas. As a result of that meeting, Ms. Curtis informed Ms. Gurley that Mr. Rathbun's conduct would not be tolerated, instructed Ms. Gurley to inform Mr. Rathbun of such and told Ms. Gurley that the occurrence of any further incidents would cause WBH to ban Mr. Rathbun from its premises and potentially sever its contract with Med Copy. (R. 34, Def.'s Mot. for Sum. Judgment, Affidavit of Curtis).

After April 5, Mr. Rathbun never engaged in any touching or sexual commentary with Tracy. (R.19, Dep. of Tracy pp. 49, 64). Tracy alleges, however, that between April 6 and mid-May, Mr. Rathbun breathed on her, used her phone rather than the one he was assigned to, and reached over her shoulder. Tracy alleges that these incidents, not contained in her April 23, 1996, written account, happened three to five times between April 6 and mid-to-late May. (R.19, Dep. of Tracy p. 49). On May 30, 1996, Tracy went to Don Brown, Assistant Director of Human Resources and reported that Mr. Rathbun was using her phone, breathing heavy and had reached over her shoulder. (R.19, Dep. of Tracy p. 59). On May 31, 1996, Dick Thomas, Executive Director of Human Resources arranged a meeting with Tracy wherein she stated the same complaints. (R.19, Dep. of Tracy p. 63).

On May 31, after meeting with Mr. Thomas, and in response to Ms. Tracy's May 30, 1996 complaints regarding Mr. Rathbun, Ms. Curtis called Ms. Gurley and informed her that Mr. Rathbun was banned from hospital premises.

Hospital security was also informed that Mr. Rathbun was not allowed on WBH's premises unless he was a patient or he was visiting a patient. (R. 34, Def.'s Mot. for Sum. Judgment, Affidavits of Curtis and Thomas, R.1; Dep. of Tracy p. 67). Tracy had no further involvement with Mr. Rathbun after May 31, 1996. (R.19, Dep. of Tracy p. 67).

V. Ms. Tracy's Allegations of Retaliation.

Ms. Tracy's Complaint additionally alleged that WBH retaliated against her for complaining of the alleged sexual harassment. (R.1, Complaint ¶ 11).

1. Ms. Tracy Alleges That She Was Called A "Troublemaker."

Ms. Tracy alleges that WBH retaliated against her when, on May 31, Ms. Tracy's supervisor, Linda Ramsey, called Ms. Tracy into her office and allegedly told her "to shut up about Don and quit causing trouble, because we don't need a troublemaker in the office." (R.19, Dep. of Tracy p. 72). Ms. Tracy was called into Ms. Ramsey's office because she had been discussing Mr. Rathbun and her situation with all of her co-workers. She was repeatedly recounting the incident, telling her co-workers that she was going to make the hospital pay and disrupting the ability of her co-workers and supervisors to do their jobs. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). Several of Ms. Tracy's co-workers complained that they were not able to work because she was such a disruptive influence. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). The co-workers, who complained to Ms. Ramsey told Ms. Ramsey that Ms. Tracy was a troublemaker.

When discussing the complaints of her co-workers with Ms. Tracy, Ms. Gurley informed her that she should not discuss personal issues with her co-workers. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). Ms. Tracy was told that the situation was a private one, it was not the business of other hospital employees, and personal issues should not be discussed during work time. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). Furthermore, Ms. Tracy was attempting to spend, literally, hours each day with both her supervisor, Ms. Ramsey, and the Department Director, Ms. Curtis, discussing how the hospital was going to reconcile her complaints and compensate her for the alleged harassment. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey).

2. Ms. Tracy Alleges Retaliation Because She Was Denied Vacation Day.

Ms. Tracy alleged that WBH further retaliated by denying her request for a vacation day when her father was going to have back surgery. (R.19, Dep. of Tracy p. 69). Ms. Tracy alleges that in May, 1997, approximately one year after her complaints, she requested the day off, one week in advance, and Ms. Curtis denied her request. (R.19, Dep. of Tracy pp. 69-70).

3. Ms. Tracy Alleges Retaliation By Virtue Of A Sign In The Flower Bed.

Ms. Tracy alleged that WBH retaliated against her by putting a homemade posterboard sign in the flower bed by the smoking area. The sign read "Betties Bloomers planted here keep your butts out". (R.19, Dep. of Tracy p. 85). Ms. Tracy became upset and notified security that she was

again being harassed. The gardener, however, admitted that he had written and placed the sign in the garden to protect the flowers growing in the garden, called "Blooming Betties." The garden was next to the smoking area and employees constantly threw their cigarette butts in the flower garden. He, therefore, erected a clever sign in the hopes of discouraging the smokers from ruining the flowers. The gardener had no knowledge of Ms. Tracy. (R.34, Def.'s Mot. for Sum. Judgment, Ex.4, Statement of Clarence Thomas, gardener, security report and Affidavit of Thomas).

4. Ms. Tracy Alleges Retaliation For Using A Plain White Piece Of Paper for Write-Up.

Ms. Tracy alleged that WBH retaliated against her when, in June 1996, she left a voice mail for Linda Ramsey that she was leaving the hospital premises for lunch. Ms. Ramsey informed Ms. Tracy that her leave was unauthorized and began to document the incident in a "write-up." Ms. Tracy alleges that the write-up was retaliatory because Ms. Ramsey used a "plain white piece of paper instead of the formal corrective action form." (R.19, Dep. of Tracy p. 93). In fact, the "plain, white piece of paper" was not a reprimand, but Ms. Ramsey was simply taking notes of their conversation. When Ms. Tracy protested, Ms. Ramsey threw the notes away. Ms. Tracy was not reprimanded for leaving the hospital premises without permission. She was simply reminded of hospital policy. There was no discipline or reprimand. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey).

5. Ms. Tracy Alleges Retaliation Because She Was Denied A Pay Increase.

Finally, Ms. Tracy alleges that she was retaliated against because she was denied a pay increase after she complained of sexual harassment. (R.19, Dep. of Tracy pp. 107-108). Ms. Tracy was promoted on April 28, 1996, to a data entry position, five days after she submitted written documentation of her complaints. (R.34, Def.'s Mot. for Sum. Judgment, Ex. 4; R.19, Dep. of Tracy p. 108). She assumed that position and received the raise associated with that position in May 1996.

As with any new position in the hospital, Ms. Tracy was on a ninety-day probationary period, at the end of which she was to receive either an additional pay raise, or to be continued on probation if all of the requirements of the new position had not been met. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Thomas). Ms. Tracy did not meet all the requirements of the new position by the end of the ninety days. She was not exposed to all facets of her new position because of her numerous absences during the initial ninety day period. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey). Nor had Ms. Tracy learned to combine medical records, one of the largest requirements of her position. (R.34, Def.'s Mot. for Sum. Judgment, Ex. 7, evaluation). However, at the end of her second ninety day period, Ms. Tracy was removed from probationary status and awarded a post-probationary increase of twenty-two cents. (R.34, Def.'s Mot. for Sum. Judgment, Ex. 8). As stated in her evaluation at the end of her second ninety days, "Betty has been trained in the remainder of her tasks." (R.34, Def.'s Mot. for Sum. Judgment, Ex. 9, evaluation). She continued to receive periodic raises over the remainder of her employment with WBH. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Ramsey).

6. Additional Allegations of Retaliation.

Ms. Tracy's additional allegations of retaliation include:

- On June 21, 1996, Ms. Tracy complains of Mr. Rathbun being in the hospital parking lot for twenty minutes while he dropped off and picked up an individual. He never entered the hospital premises and never spoke with Ms. Tracy. (R.19, Dep. of Tracy p. 103).

- Don Brown and Ms. Curtis suggested to Plaintiff that she access the Employee Assistance Program ("EAP"), which she did. (R.19, Dep. of Tracy p. 102). Later, Ms. Tracy claimed that it was retaliation that she could not have more EAP visits, so WBH allowed her unlimited visits to the EAP at the hospital's expense. (R.19, Dep. of Tracy pp. 106-107, Affidavit of Brown).

- Paula Rector allegedly told Ms. Tracy that she was not the "office spokesperson", a comment that Ms. Tracy contends is offensive (R.19, Dep. of Tracy p. 117).

- Ms. Tracy parked her car in an unauthorized parking lot and was told by security that if she parked it there again it would be towed. (R.19, Dep. of Tracy p. 186). A woman working in the Pediatric Group building, who did not know Ms. Tracy, called security and told them an unauthorized car was parked in the lot. (R.34, Def.'s Mot. for Sum. Judgment, Ex. 5, Statement of Wilma Sheppard, security report and Thomas' affidavit). Security investigated and

discovered it was Ms. Tracy's car. They called her to have her move the car. Ms. Tracy moved her car and the hospital never towed it. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Thomas).

- Ms. Tracy alleges that she was denied a transfer to a position at the Prime Care Center, an off-premises location. (R.19, Dep. of Tracy p. 144). No jobs were available at the time, no job was posted and Ms. Tracy never expressed an interest in any particular position. She only discovered that a prior position existed at the off-premises location when her mother took the position. (R.34, Def.'s Mot. for Sum. Judgment, Affidavit of Thomas).

- Ms. Tracy alleges that her pastor, with whom she had been counseling, singled her out during a church service and stated that "Christians don't sue". When asked if she held Western Baptist Hospital responsible for her pastor's actions, Ms. Tracy stated "Yes, I do. Yes, I do".(R.19, Dep. of Tracy p. 186).

In January 1998 Ms. Tracy filed a lawsuit against WBH claiming sexual harassment and retaliation. On July 29, 1999, Ms. Tracy's attorney withdrew from the case and Ms. Tracy proceeded *pro se*. WBH moved for summary judgment on July 30, 1999.

On October 18, 1999 the District Court entered its Memorandum Opinion and Order (R. 42) granting WBH's Motion for Summary Judgment, and dismissed the action with prejudice. Ms. Tracy appealed the District Court's

Opinion and Order to the Sixth Circuit Court of Appeals. On September 26, 2000, the Sixth Circuit Court of Appeals affirmed the District Court's grant of Summary Judgment.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS ARE NOT IMPORTANT

The Petition for Writ of Certiorari should be denied because the questions are not novel, her claims involve well-settled law and turn only on the specific facts of her case. Petitioner presents five questions, which essentially ask whether she proved her sexually hostile work environment claim and her retaliation claim. There is no conflict among the circuits regarding the elements of sexual harassment and retaliation under Title VII. With regard to Petitioner's hostile work environment claims, the courts below applied the elements and standards recently elucidated by the Supreme Court. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). The courts below analyzed the Title VII retaliation claim in accordance with the burden-shifting analysis espoused in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

The decision below turns upon its own facts. There is no dispute as to the relevant law or standards applied to Ms. Tracy's claims. The questions of alleged importance

involve whether Petitioner has sufficiently alleged an actionable hostile work environment and retaliation claim. These questions will affect few individuals, other than the litigants, and are not appropriate for granting certiorari. The Supreme Court has denied petitions for writ of certiorari in other cases involving similar legal and factual issues. *See Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir.) (finding conduct not sufficiently severe or pervasive so as to establish a hostile work environment claim), *cert. denied*, 522 U.S. 865, 118 S. Ct. 172, 139 L. Ed. 2d 114 (1997). Petitioner has presented no important questions for the Court to consider, and the Petition should be denied.

II.

THE SIXTH CIRCUIT'S HOLDING IS REASONABLE AND APPROPRIATE.

A. Plaintiff Failed To Offer Facts Necessary to Establish A *Prima Facie* Case Of Sexual Harassment Based On A Theory Of Hostile Work Environment

The Sixth Circuit's decision in *Tracy v. WBH* is completely consistent with the Supreme Court's decisions in *Burlington Industries, supra*, and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); as well as the Sixth Circuit decisions in *Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997), *Blankenship v. Parke Care Centers*, 123 F.3d 868 (6th Cir. 1997), and *Burnett v. Tyco Corp.*, 203 F.3d 980 (6th Cir. 2000). Ms. Tracy's allegations do not satisfy the requirement of severe and pervasive conduct. Notwithstanding the severity of her allegations, WBH responded promptly and adequately to her complaints.

In total, Ms. Tracy's allegations of sexual harassment state that Mr. Rathbun, an employee of a vendor of the hospital, on one day subjected her to unwanted sexual harassment by twice touching her bottom and uttering one mild comment consisting of innuendo. (R.1, Complaint ¶ 6). As the Sixth Circuit properly held, even taking all of Ms. Tracy's allegations in the light most favorable to her, she has not established a *prima facie* case of sexual harassment based upon a hostile work environment. Ms. Tracy has failed to prove that the alleged harassment was so severe and pervasive that it affected the terms and conditions of her employment, or the existence of *respondeat superior* liability. Both are essential to a legally sufficient claim of sexual harassment. As the Sixth Circuit stated:

> Although Rathbun's conduct was offensive, Tracy failed to demonstrate the existence of a genuine issue of material fact as to whether Rathbun's alleged actions were sufficiently severe or pervasive as to create an objectively hostile work environment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993); *Burnett v. Tyco Corp.*, 203 F.3d 980, 984-85 (6th Cir. 2000). The determination of whether the challenged conduct was "sufficiently severe" depends on it's frequency, whether it posed a physical or humiliatory threat, and whether it reasonably interfered with the plaintiff's work performance. *Harris*, 510 U.S. at 23. These are the elements that Tracy failed to show. Furthermore, when Tracy notified WBH of Rathbun's objectionable conduct, WBH took immediate and appropriate corrective action. *See Fenton*, 174 F.3d at 831.

(App. 1-C).

The Sixth Circuit Court of Appeals properly found that the alleged actions of Mr. Rathbun did not rise to the level of actionable sexual harassment because both the comment and the touching were isolated incidents occurring in the span of a few hours on one day. Furthermore, neither was ever repeated. Looking at the totality of the circumstances, Mr. Rathbun's actions did not constitute a legally actionable hostile work environment. His actions were not so severe and pervasive as to substantially alter Ms. Tracy's work environment. As such, Ms. Tracy did not establish a *prima facie* case of hostile work environment as stated by the Sixth Circuit in *Black v. Zaring Homes*, 104 F.3d 822 (6th Cir. 1997) (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49 (1986)).

Additionally, the Sixth Circuit Court of Appeals properly determined that WBH responded promptly and adequately to Tracy's allegations of sexual harassment. (App. 1-C). In order for Tracy to prove a *prima facie* case of co-worker sexual harassment, she had to prove the existence of *respondeat superior* liability. Because WBH responded to Ms. Tracy's complaint with prompt corrective action it is not liable for alleged harassment by Ms. Tracy's co-workers.

> [W]hen an employer responds to charges of co-worker sexual harassment, the employer can be liable *only if* its response manifests *indifference* or *unreasonableness* in light of the facts the employer knew or should have known.
>
> * * *
>
> Once an employer is aware of and responds to charges of sexual harassment, though, *mere negligence as to*

> *the content of the response cannot be enough to make the employer liable.*
>
> * * *
>
> When an employer implements a remedy, it can be liable for sex discrimination in violation of Title VII *only if* that remedy exhibits *such indifference as to indicate an attitude of permissiveness* that amounts to discrimination.

Blankenship v. Parke Care Centers, 123 F.3d 868, 873 (6th Cir. 1997) (Emphasis supplied).

Ms. Tracy did not demonstrate *respondeat superior* liability, as correctly determined by the Sixth Circuit Court of Appeals. WBH became aware of Ms. Tracy's allegations only through its own investigation into another matter, and *not* because Ms. Tracy independently reported the alleged actions. After discovering Ms. Tracy's complaints regarding Mr. Rathbun, WBH elicited a statement from Ms. Tracy detailing them. After receiving her statement, WBH responded by contacting Mr. Rathbun's employer, Med Copy, and expressed its demand that the complained of conduct cease, under threat of removal from the premises and contract termination. After receiving her second complaint, wherein she admitted that there had been no further touching or inappropriate comments, WBH nevertheless banned Mr. Rathbun from the facility. This prompt and appropriate remedial action did not demonstrate any indifference by WBH. Quite to the contrary, the evidence, as admitted by Ms. Tracy, demonstrated a rapid and aggressive response to all of Plaintiff's complaints. It cannot be said that WBH's

instruction and removal of Mr. Rathbun "exhibit[ed] such indifference as to indicate an attitude of permissiveness." *Blankenship*, *supra* at 873.

Ms. Tracy did not satisfy the *respondeat superior* element of proving a *prima facie* case of co-worker sexual harassment. The District Court properly dismissed her claim and the Sixth Circuit Court of Appeals properly affirmed the dismissal.

B. Summary Judgment Was Appropriate As To Plaintiff's Retaliation Claim Because She Failed To Offer Facts Sufficient To Establish A *Prima Facie* Case And, Alternatively, Failed To Offer Facts That The Articulated Reasons For the Complained-Of Actions Were Pretextual

The Sixth Circuit Court of Appeals properly affirmed the dismissal of Ms. Tracy's claim of retaliation based on the fact that Ms. Tracy could not establish that she suffered an adverse employment action, and even had she done so, she offered no evidence that WBH's legitimate non-discriminatory reasons for its actions were pretextual. (App. 1-C, 1-D).

Virtually all, if not all, of the actions complained of by Ms. Tracy fail to rise to the level of an adverse employment action. Specifically, the following complained of actions simply are *not* material changes in terms and conditions of employment, *Rabinovitz v. Penna*, 89 F.3d 482, 488 (7th Cir. 1996), but rather are merely trivial employment actions: (1) allegedly being told to "quit causing trouble because we don't need a troublemaker in the office"; (2) denial of her request for a vacation day; (3) the sign

in the flower bed; (4) the alleged write-up when Ms. Tracy left the premises without speaking to her supervisor; (5) Mr. Rathbun's presence in the hospital parking lot for 20 minutes one day; (6) the suggestion that she access the EAP program; (7) being told she was "not the office spokesperson"; and, (8) being told if she again parked in an unauthorized lot she would be towed. Ms. Tracy's complaint that her pastor stated that "Christians don't sue", is not an employment action at all. As the Sixth Circuit Court of Appeals correctly stated, none of the actions alleged by Tracy altered the "compensation, terms, conditions or privileges" of her employment.

Ms. Tracy also alleges that she was retaliated against when she was promoted to a new position, given a pay increase, but then denied an additional pay increase at the end of her initial ninety-day probationary period. She was continued on probation for an additional ninety days and at the end of the second period, she was given her pay increase. The Sixth Circuit properly found that this was not a retaliatory action. (App. D-1).

It is illogical to infer that WBH gave Ms. Tracy a promotion, with a twenty-five cent an hour increase, so that they could delay her twenty-two cent an hour increase, which she received at the end of her probationary period, in order to "retaliate" against her.

However, assuming *arguendo*, that those two occurrences constituted "adverse employment actions", the Sixth Circuit Court of Appeals properly found that WBH articulated legitimate non-discriminatory reasons for both

actions, and Tracy presented no evidence, other than her own conclusory statements, that WBH's articulated reasons were pretextual. As the Sixth Circuit stated:

> Tracy failed to establish a prima facie case of retaliation, as none of the alleged acts of retaliation involved an adverse employment action. The only actions that could possibly be construed as adverse are the denial of a transfer and initial post-probation pay increase. However, even if Tracy could establish a prima facie case of retaliation, WBH had legitimate, non-discriminatory reasons for denying her request for a transfer and initial post-probation pay increase and Tracy has not provided evidence from which a reasonable jury could conclude that WBH's proffered reasons were a pretext for discrimination. See *Burdine*, 450 S. at 253; McDonnell Douglas, 411 U.S. at 804.

(App. D-1).

For the above-stated reasons' the Sixth Circuit Court of Appeals properly dismissed Ms. Tracy's retaliation claim.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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